STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
White, P.J., Cavanagh, Saad, Hoekstra, O'Connell, Owens, and Cooper, JJ (Special Panel)
Jansen, P.J., Neff and Zahra, JJ (Hearing Panel)

ERIC A. BRAVERMAN, Successor Personal Representative of the Estate of Patricia Swann, Deceased,

Plaintiff-Appellee,

Docket Nos. 134445, 134446

v

GARDEN CITY HOSPITAL, a/k/a GARDEN CITY HOSPITAL OSTEOPATHIC,

Defendant,

and

JOHN R. SCHAIRER, D.O., GARY YASHINSKY, M.D., ABHINAV RAINA, M.D., and PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.,

Defendants-Appellants.
_____/

AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

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STATEMENT OF QUESTIONS PRESENTED

I. **Whether *Eggleston* exclusively relied on the unambiguous language of MCL 600.5852 and held that appointment of a successor personal representative triggers a new savings period and establishes that a new savings period applies notwithstanding when or why the successor personal representative is appointed of if more than one suit is filed.**

Plaintiff-Appellee states: Yes.

Plaintiff's amicus the MAJ states: Yes.

Defendants-Appellants state: No.

The trial court stated: Yes.

The Court of Appeals' first decision stated: Yes.

II. **Whether the Court of Appeals unanimous special panel correctly held that the term "person" in MCL 600.2912b(1) includes the duly appointed personal representative of an estate at any given time and that the Estates and Protected Individuals Code (EPIC) allows a successor personal representative to file suit in reliance on a notice of intent served by a predecessor personal representative.**

Plaintiff-Appellee states: Yes.

Plaintiff's amicus the MAJ states: Yes.

Defendants-Appellants state: No.

This issue was not raised in the trial court.

The Court of Appeals' first decision stated: Yes.

The Court of Appeals special panel stated: Yes.

III. **Whether dismissal of a subsequent action under MCR 2.116(C)(6) as abated by a previous action cannot possibly bar the previous action under the res judicata doctrine, since res judicata potentially bars a subsequent suit only when a prior action is dismissed.**

Plaintiff-Appellee states: Yes.

Plaintiff's amicus the MAJ states: Yes.

Defendants-Appellants state: No.

This issue was not raised in the trial court or Court of Appeals.

INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. Comprised of more than 1,700 attorneys, the MAJ recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state.

In its September 26, 2007 order granting leave, the Court invited the MAJ and the Michigan Defense Trial Counsel, Inc "to file briefs amicus curiae." (9/26/07 order). At the Court's invitation, the MAJ now does so.

STATEMENT OF FACTS

The MAJ adopts the Plaintiff-Appellee's (Plaintiff's) statement of facts.

ARGUMENT

I. *EGGLESTON* EXCLUSIVELY RELIED ON THE UNAMBIGUOUS LANGUAGE OF MCL 600.5852 AND HELD THAT APPOINTMENT OF A SUCCESSOR PERSONAL REPRESENTATIVE TRIGGERS A NEW SAVINGS PERIOD. *EGGLESTON'S* FAITHFUL TEXTUAL READING OF MCL 600.5852 ESTABLISHES THAT A NEW SAVINGS PERIOD APPLIES NOTWITHSTANDING WHEN OR WHY THE SUCCESSOR PERSONAL REPRESENTATIVE IS APPOINTED OR IF MORE THAN ONE SUIT IS FILED.

Summary of Argument

The unambiguous language of MCL 600.5852 and *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), definitively establish that appointment of a successor personal representative triggers a new two-year wrongful death savings period – notwithstanding the timing or reasons for the appointment. Appellants identify no valid basis to distinguish or overrule *Eggleston*.

Appellants' policy arguments and requests to limit MCL 600.5852 to certain facts must be directed to the Legislature.

Standard of Review

Appellate courts review rulings on motions for summary disposition de novo. *McClements v Ford Motor Co,* 473 Mich 373, 380; 702 NW2d 166 (2005). Interpretation of a statute is a question of law reviewed de novo. *Wakin v Chamberlain,* 467 Mich 329, 332; 653 NW2d 176 (2002).

A. Applying only the unambiguous language of MCL 600.5852, *Eggleston* unequivocally holds that appointment of a successor personal representative triggers a new savings period running not from when the original personal representative was appointed, but from issuance of letter of authority to the successor.

In *Eggleston*, this Court resolved an issue of first impression and held that the unambiguous language of MCL 600.5852 grants a successor personal representative a new two-year savings period even if the successor filed suit more than two years after appointment of the original personal representative. *Eggleston* is a purely textual decision. This Court's application of MCL 600.5852 rested exclusively on the statute's plain language, without consideration of case-specific facts or public policy.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. *Adrian School District v Michigan Public School Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998). If, however, "the language of the statute is clear, no further analysis is necessary or allowed." *Eggleston*, 468 Mich at 32 (citation omitted). When addressing a clear and unambiguous statute, Michigan courts must "assume that the Legislature intended its plain meaning" and enforce the

statute "as written." *Roberts v Mencosta County General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) (citation omitted). "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id* (citation omitted).[1]

The wrongful death saving statute, MCL 600.5852 states that:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

In *Eggleston*, this Court addressed the question "whether a successor personal representative has two years after appointment to file an action on behalf of the estate under . . . MCL § 600.5852, or whether the two-year period is measured from the appointment of the initial personal representative." *Id*, 468 Mich at 30. The Court correctly described this as an issue "of first impression." *Id* at 32.

In the underlying *Eggleston* appeal, the Court of Appeals had held that the statutory savings period runs only from appointment of the original personal representative, not from appointment of a successor. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 248 Mich App 640, 648-649; 645 NW2d 279 (2002). The Court of Appeals' citation to MCL 600.5852 mistakenly inserted the word "the" before "letters of authority are issued." *Id* at 647. The Court of Appeals then declared that the statute should be narrowly construed, in pertinent part, because "the plain language of

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[1] The MAJ accordingly agrees with Plaintiff that an unambiguous statute must not be narrowly or liberally construed, but must be enforced as written. (Plaintiff's brief, pp 9-12).

the savings clause refers to one set or 'the' letters of authority, not multiple letters of authority." *Id* at 649.

In addition to misquoting MCL 600.5852, the Court of Appeals panel also interjected its policy viewpoint on the statute's language. After noting that the "plaintiff did not petition the court to become successor personal representative until fifteen months after (the original representative's) death," the Court of Appeals declared that allowing "an additional two years from the time plaintiff chose to seek his appointment to pursue a medical malpractice claim would be tantamount to sanctioning his tardiness and would encourage personal representatives to sit on the rights they could assert on behalf of the decedent." *Id* at 651.

This Court reversed, in a unanimous per curiam decision. It concluded that "the Court of Appeals misread the statute and then relied on that erroneous reading in reaching its decision." *Eggleston*, 468 Mich at 30. It explained that "[a]lthough the Court of Appeals purported to construe and apply the plain language of MCL § 600.5852, the Court misquoted the statute by inserting 'the' before 'letters of authority.'" *Id* at 32. This Court further indicated:

> The [Court of Appeals] relied on this misquotation in holding that a personal representative must bring an action within two years after the initial letters of authority are issued to the first personal representative. This is not, however, what the statute says. **The statute simply provides that an action may be commenced by the personal representative 'at any time within 2 years after letters of authority are issued although the period of limitations has run.' The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date the letters of authority are issued to the initial personal representative**.
>
> Plaintiff was 'the personal representative' of the estate and filed the complaint 'within 2 years after letters of authority [were] issued,' and

'within 3 years after the period of limitations ha[d] run.' MCL 600.5852. The action was accordingly timely. *Id* at 33 (emphasis added).

Eggleston's holding and application of the unambiguous language of MCL 600.5852 establish that appointment of a successor personal representative always triggers a new two-year savings period. *Eggleston* resolved the issue that MCL 600.5852 allows multiple letters of authority to successive personal representatives. The statute's plain wording does not permit consideration of when or why the successor personal representative was appointed, let alone sanction judicial evaluation of policy considerations, which represent usurpation of the Legislature's exclusive prerogatives.

Trying to avoid *Eggleston's* clear holding, Appellants argue that *Eggleston* misconstrued the phrase "the personal representative" and other language in MCL 600.5852. They claim that this statute's text permits only one two-year grace period running from appointment of the original personal representative. Appellants also contend that *Eggleston* is limited to its facts and applies only when letters of authority are issued to a successor personal representative due to the death or incapacity of the predecessor within two years of the original appointment. Appellants finally urge this Court to betray its established rules governing application of an unambiguous statute and interject "policy considerations" into the implementation of MCL 600.5852. Nothing in MCL 600.5852 or *Eggleston* supports these tortured interpretations. *Eggleston* is clear that appointment of a successor personal representative always triggers a new savings period. The statute's unambiguous language does not permit any other reading.

B. MCL 600.5852 is not ambiguous and may not be read to provide only a single two-year savings period running from appointment of the original personal representative or precluding a new savings period if the original personal representative served for two years.

Appellants argue that MCL 600.5852 is "susceptible to various meanings" and may be construed to provide only one two-year savings period running from appointment of the original personal representative. This argument disregards *Eggleston*, *supra*, and is totally devoid of merit.

After citing the general rule that, "[i]f the language of a statute is clear, no further analysis is necessary or allowed," *Id* at 32, *Eggleston* held that the language of MCL 600.5852 is unambiguous and provides for a new two-year savings period upon appointment of a successor personal representative. The pertinent portion of *Eggleston's* holding bears repeating:

> The language adopted by the Legislature **clearly** allows an action to be brought within two years after letters of authority are issued to the personal representative. **The statute does not provide that the two-year period is measured from the date the letters of authority are issued to the initial personal representative**. *Id* at 33 (emphasis added; citation omitted).

This Court specifically concluded that MCL 600.5852 is clear. The statute's plain wording permits the issuance of multiple letters of authority. It therefore grants a new two-year savings period upon appointment of any successor personal representative. Nothing in MCL 600.5852 precludes a new savings period if the original personal representative served two years or if more than two years pass from the original personal representative's appointment.

Notwithstanding, Appellants erroneously argue that MCL 600.5852 should be read to provide only one two-year savings period from appointment of the original personal representative. Appellants' reliance on the phrase "the personal

representative" in MCL 600.5852 ignores *Eggleston's* holding that the statute is unambiguous and "does not provide that the two-year period is measured from the date the letters of authority are issued to the initial personal representative," but creates a new savings period upon appointment of a successor. *Eggleston*, *supra* at 33.

Appellants mistakenly contend that *Eggleston* failed to address the phrase "the personal representative." Appellants' conspicuously avoid this Court's conclusion that unambiguous language "adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to **the personal representative."** *Id* (emphasis added).

The words "the personal representative" merely reflect that there is only one personal representative at a time and, through the definite article, depicts the current personal representative. It additionally reflects that, under the wrongful death statute, MCL 600.2922(2), all wrongful death actions "shall be brought by, and in the name of, the personal representative of the estate of the deceased person." The term "the personal representative," concurrently used in both MCL 600.5852 and the wrongful death statute, designates the party bringing the action – the representative of the estate. It does not limit the savings period to only the original personal representative.

Even more, the language of MCL 600.5852 does not alter the fact that there may be successive personal representatives. The Estates and Protected Individuals Code's (EPIC's) definition of a personal representative states that:

> 'Personal representative includes, but is not limited to, an executor, administrator, successor personal representative, and special personal representative, and any other person who performs substantially the same function under the law governing that person's status. MCL 700.1106(n) (emphasis added).

Both MCL 700.1106(n) and MCL 600.5852 explicitly provide that successive personal representatives may be appointed and that the savings period is measured from appointment of each successor, not the original personal representative.

Had the Legislature intended to limit the savings statute to only the original personal representative, it would have used the phrase "the initial personal representative." Or, like the Court of Appeals in *Eggleston*, the Legislature would have placed the word "the" before "letters of authority." The language chosen by the Legislature mandated *Eggleston's* unanimous, definitive, per curiam ruling. Appellants' strained argument does not remotely support overruling *Eggleston*.

Appellants mistakenly rely on *Lindsey v Harper Hosp*, 455 Mich 56; 564 NW2d 861 (1997). *Lindsey*, which pre-dated *Eggleston*, merely held that re-issuance of letters of authority to the original personal representative does not trigger a new savings period under MCL 600.5852.[2] *Lindsey* did not address appointment of a successor personal representative. Indeed, *Eggleston* specified that operation of MCL 600.5852 when a successor personal representative is appointed was an issue of "first impression." *Eggleston*, *supra* at 32. *Lindsey* is patently distinguishable from cases involving appointment of successor personal representatives, where new letters of authority are issued.

Like *Lindsey*, *Gainforth v Bay Health Care*, unpublished opinion of the Court of Appeals, issued August 11, 2005 (Docket No. 260054), lv den 474 Mich 1086; 711 NW2d 339 (2006) (Addendum A), cited by Appellants, is inapplicable. *Gainforth* holds

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[2] The plaintiff in Lindsey was originally appointed temporary personal representative, then appointed personal representative. Because the two appointments under the Revised Probate Code were constructively indistinguishable, this Court held that the savings period ran from when the plaintiff was appointed temporary personal representative. *Id* at 67.

that re-appointment of the original personal representative, whose original letters of authority expired, does not trigger a new savings period under MCL 600.5852. *Gainforth* did not address a successor personal representative.

Contrary to Appellants, *McLean v McElhaney*, 269 Mich App 196, 201-202; 711 NW2d 775 (2005), is not analogous to this issue. In *McLean*, the Court of Appeals affirmed summary disposition where the original PR filed suit more than two years after appointment. Unlike the case at bar, in *McLean* no successor personal representative was appointed. *McLean* is not only inapplicable, but does not remotely hold that a successor personal representative is limited by the original two-year savings period.

C. Appellants' attempt to distinguish *Eggleston* on its facts is totally misplaced. *Eggleston* rejected consideration of why or when a successor personal representative is appointed. Michigan law prohibits judicial engrafting of a "necessity" or "good cause" requirement into MCL 600.5852.

Appellants erroneously try to distinguish *Eggleston* on its facts. Appellants incorrectly argue that *Eggleston* applies only in cases when the successor personal representative is appointed less than two years after letter of authority were issued to the original PR. Appellants also spuriously contend that *Eggleston* is limited to cases where the successor personal representative was appointed due to "necessity," such as the original personal representative's death. Contrary to Appellants' contentions, MCL 600.5852 and *Eggleston* do not permit consideration of why or when a successor PR is appointed. This is a matter addressed to the exclusive jurisdiction of the probate court and not subject to collateral attack or review in proceedings conducted in circuit court. The fact of the appointment alone is determinative.

Reminding the Bench and Bar of its strict prohibition against judicial construction of an unambiguous statute, this Court in *Eggleston* reversed the Court of Appeals – not

based on any disagreement over the wisdom of allowing a new savings period after appointment of a successor personal representative – but based solely on the fact that the Court of Appeals misquoted and misconstrued the plain language of MCL 600.5852. *Id*, 468 Mich at 32-33. This Court has repeatedly stated that "[w]e cannot read requirements into a statute that the Legislature did not put there." *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 423; 565 NW2d 844 (1997); see also *Roberts*, *supra*, 466 Mich at 63.

The fact that the original personal representative in *Eggleston* died in no way limits *Eggleston's* holding to any narrow context. The fact that Plaintiff was appointed more than two years after her predecessor is also irrelevant. There is no "necessity" or "good cause" requirement in MCL 600.5852. Commencement of a new savings period automatically occurs when letters of authority are issued to a successor personal representative. Nothing in the statute's plain language permits consideration of when or the circumstances under which the successor personal representative is appointed.

D. MCL 600.5852 does not limit the personal representative or successor personal representative to only one case filing.

Contrary to Appellants, use of the term "an action" in MCL 600.5852 does not preclude personal representatives from filing multiple wrongful death actions. The word "an" is an indefinite article. *In re Costs and Attorney Fees,* 250 Mich App 89, 102; 645 NW2d 697 (2002). It conveys only a "generalizing" meaning, not a "specifying or particularizing effect." *Id.* Had the Legislature intended to limit application of the savings period to a single action, it would have used the words "one action which survives at law may be commenced . . ."

Michigan courts have long recognized that the personal representative of an estate may commence multiple wrongful death actions. See *Bajorek v Kurtz*, 335 Mich 58, 60; 55 NW2d 727 (1952); *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 252; 660 NW2d 344 (2003). The phrase, "an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run," merely provides that any wrongful death claim must be commenced within the two-year savings period. MCL 600.5852 does not limit the personal representative to one case filing.

Appellants' reliance on *King v Briggs*, unpublished opinion of the Court of Appeals, issued July 12, 2005 (Docket Nos. 259136, 259229) (Addendum B), *McMiddleton (Harris) v Boling*, 267 Mich App 667; 705 NW2d 720 (2005), and *McLean*, *supra*, is unavailing. *King* held that appointment of a successor personal representative did not trigger a new savings period under MCL 600.5852 when the original personal representative had filed a previous suit that remained pending. Unlike in *King*, the original personal representative in this case never filed a complaint. *King* is therefore materially distinguishable and need not be further addressed.

Appellants also mistakenly rely on *McMiddleton*, *supra.* In *McMiddleton*, and unlike this case, the successor personal representative tried to resurrect an untimely complaint filed by his predecessor. No untimely complaint was filed in this case – by the original personal representative or her successor.

Finally, *McLean*, *supra*, does not remotely apply in this case. *McLean* affirmed summary disposition where the original personal representative filed suit more than two

years after appointment. Since no successor personal representative was appointed and no timely complaint was filed, *McLean* does not apply in this case.

Absolutely nothing in MCL 600.5852 precludes a successor personal representative from filing a new suit within two years of his appointment.[3] Appellants erroneously try to impose non-existent limitations on this unambiguous statute.

E. Appellants' policy arguments should be directed to the Legislature and not at carving out judge-made exceptions to the unambiguous language of MCL 600.5852.

Appellants repeatedly argue that "policy concerns" warrant limiting *Eggleston* and the statutory savings period to "the appropriate circumstances." This is impermissible.

MCL 600.5852 is clear. Appointment of a successor personal representative always triggers a new savings period – notwithstanding why or when he is appointed.

If Appellants disagree with the wisdom behind MCL 600.5852, they should take it up with the Legislature. Courts may not alter the plain language of a statute to reflect their view of public policy. *Roberts*, *supra*. *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004).

Finally, Appellants complain that application of MCL 600.5852 to permit new savings periods on appointment of successor personal representatives leads to "absurd results" and abolition of the statutes of limitations. At the outset, the "absurd result" rule applies only when the statute is ambiguous. *Gilbert v Second Injury Fund*, 463 Mich 866, 867; 616 NW2d 161 (2000). This statute is not ambiguous.

Moreover, granting a successor personal representative a new two-year savings period within the outside ceiling of MCL 600.5852 is hardly "absurd." It reflects the

[3] Whether Plaintiff's subsequent filing precluded the case at bar is a separate issue addressed in Argument III.

Legislature's intent to give the successor personal representative sufficient time to investigate and file actions. Granting successive savings periods also does not abolish the statute of limitations. Appellants conveniently overlook the three-year ceiling in MCL 600.5852 that maintains a strict, outside limit on the application of savings periods.

Appellants fail to present any meritorious grounds for disturbing *Eggleston* or judicially engrafting their "policy considerations" onto the savings statute.

II. THE COURT OF APPEALS UNANIMOUS SPECIAL PANEL CORRECTLY HELD THAT THE TERM "PERSON" IN MCL 600.2912b(1) INCLUDES THE DULY APPOINTED PERSONAL REPRESENTATIVE OF AN ESTATE AT ANY GIVEN TIME AND THAT EPIC ALLOWS A SUCCESSOR PERSONAL REPRESENTATIVE TO FILE SUIT IN RELIANCE ON A NOTICE OF INTENT SERVED BY A PREDECESSOR PERSONAL REPRESENTATIVE.

Summary of Argument

The Court of Appeals special panel in *Braverman v Garden City Hosp (Braverman II)*, 275 Mich App 705; 740 NW2d 744 (2007), correctly held that EPIC authorized Plaintiff to rely on the notice of intent (NOI) served by his predecessor personal representative. Both EPIC definitional provisions and case law establish that the personal representative represents the estate and remains the same person for purposes of MCL 600.2912b(1) – even if successor personal representatives are appointed. Moreover, several EPIC statutes mandate that the NOI filed by the original personal representative relates to and may be ratified by the successor personal representative. The special panel's decision must be affirmed.

Standard of Review

The MAJ incorporates the standard of review from Argument I.

A. ***Braverman II* correctly held that the personal representative, acting in the capacity as representative for the "entity" of the estate, remains the same person even if successor personal representatives are appointed.**

1. ***Halton* and *Verbrugghe* collectively relied on an inapplicable dictionary definition which rendered individuals or organizations serving in the representative capacity as the original and successor personal representatives for the same estate different "persons" under EPIC and MCL 600.2912b(1).**

The special panel properly held that "the term 'person' in MCL 600.2912b(1) includes a person acting in a representative capacity and includes the duly appointed personal representative of an estate, whoever the person may be at any given time." *Braverman II*, 275 Mich App at 716. The panel recognized the difference between individuals representing their own interests and individuals serving in the "representative capacity" of personal representative for the decedent's estate. Taken together, *Halton v Fawcett*, 259 Mich App 699; 675 NW2d 880 (2004), and *Verbrugghe v Select Specialty Hosp*, 270 Mich App 383; 715 NW2d 72 (2006), erroneously applied a dictionary definition of a "person" as a "human being" to the issue whether individuals or organizations serving in the representative capacity as the original and successor personal representative for an estate are the same person under MCL 600.2912b(1).

MCL 600.2912b(1) states:

> Except as otherwise provided in this section, **a person** shall not commence an action alleging medical malpractice against a health professional or health facility unless **the person** has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced. (emphasis added).

Addressing the highlighted language, in *Halton*, *supra*, 259 Mich App at 701, the Court of Appeals correctly concluded that the Legislature's successive use of the words "a

person" and "the person" mandates that the same "person" filing a medical malpractice complaint must previously send a NOI.

Halton went astray, however, by declaring that nothing in EPIC "suggests that a personal representative is a separate legal entity such as a partnership or corporation." *Id* at 703. Overlooking that organizations may also serve as personal representatives, (see MCL 700.1106(m), (n) and (o), discussed below), *Halton* applied to personal representatives a dictionary definition of "person" as "a human being." *Id.* It determined that the plaintiff in that case was the same "person" in her individual capacity before she was appointed and in her subsequent "representative capacity" as personal representative. *Halton* then held that, under MCL 600.2912b(1), a NOI served by the plaintiff before she was appointed personal representative supported the complaint she filed after her appointment. *Id* at 704. After holding that the "individual" plaintiff and personal representative plaintiff were the same person under MCL 600.2912b(1), *Halton* went further astray by not reaching the issue whether the plaintiff's "appointment as personal representative should relate back to the serving of the notice of intent." *Id.*

Verbrugghe, *supra*, compounded the damage by citing *Halton*, without analysis, for the implicit proposition that an original and successor personal representative are different persons under MCL 600.2912b(1). *Id*, 270 Mich at 397. It accordingly ruled that the plaintiff, a successor personal representative, "was required to file or serve" her own NOI before commencing suit – even though the predecessor personal representative filed an adequate NOI. *Id.* *Verbrugghe* ordered, as "the appropriate sanction" for plaintiff's noncompliance with MCL 600.2912b(1), dismissal without prejudice. *Id.*

2. The judicially appointed office of personal representative, whether occupied by the original or successor personal representatives, is always the same "person" under EPIC and MCL 600.2912b.

Contrary to *Halton*, *supra*, and *Verbrugghe*, *supra*, the personal representative of an estate is a legally distinct person from the individuals or organizations serving in that capacity. EPIC's definitions and Michigan case law clearly establish that the personal representative remains the same "person" even if successors are appointed.

Under EPIC, a "'[p]ersonal representative' includes, but is not limited to, an executor, administrator, **successor personal representative**, and special personal representative, and any other person who performs substantially the same function under the law governing that person's status." MCL 700.1106(n) (emphasis added). "A successor personal representative means a personal representative, other than a special personal representative, who is appointed to succeed a previously appointed personal representative." MCL 700.1107(h).

Verbrugghe, *supra*, totally overlooks that the term "personal representative" includes any and all successor personal representatives appointed. EPIC unambiguously provides that multiple successors may serve in the same capacity of personal representative.

EPIC defines a "person" as "an individual or an organization." MCL 700.1106(m).[4] An "organization" is "a corporation, business trust, estate, trust, partnership, joint venture, association, limited liability company, government,

[4] EPIC's specification that a person may be an individual or organization is similar to numerous other statutory definitions of a "person." See MCL 8.31; MCL 333.37109(1); MCL 750.159f.

government subdivision or agency, or another legal or commercial entity." MCL 700.1106(o).

Halton missed the fact that "persons" who may be appointed personal representatives under EPIC are not only individuals, but commercial associations and governmental entities.[5] See *In re Estate of Shall v Hoy*, unpublished opinion of the Court of Appeals, issued April 29, 2003 (Docket No. 229857) (Addendum C) (addressing actions of bank serving as personal representative). EPIC further establishes that a personal representative owes distinct, fiduciary duties to the estate. MCL 700.3703(1) ("A personal representative is a fiduciary who shall observe the standard of care applicable to a trustee . . ."); MCL 700.3715 (the personal representative must act "reasonably for the benefit of interested persons").

Recognizing these duties, Michigan and national courts have consistently described the personal representative as serving in an "office." *Merkle v Twp of Bennington*, 68 Mich 133, 146; 35 NW 846 (1888); *Matter of Estate of Slack*, 202 Mich App 627, 629; 309 NW2d 861 (1993) (personal representative is liable for "failure to perform the duties of her office . . ."); *In re Kramek Estate*, 268 Mich App 565, 570; 710 NW2d 753 (2005); see also 31 Am Jur 2d Executors and Adminstrators § 874. Michigan law further holds that an individual acting in his own capacity and serving as personal representative of an estate is <u>not</u> the same party. *Jordan v C A Roberts Co*, 379 Mich 235, 242-243; 150 NW2d 792 (1967). Instead, an individual wearing these different hats are "complete strangers." *Id.*

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[5] A court may not consult a dictionary definition if the statute defines the term. *People v Denio,* 454 Mich 691, 699; 564 NW2d 13 (1997). Because EPIC includes definitions for "person" and "organization," *Halton*, *supra*, mistakenly relied on the dictionary.

The Court of Appeals drove home the legal distinction between an individual representing his own interests and those of an estate in *Shenkman v Bragman*, 261 Mich App 412; 682 NW2d 516 (2004). In *Shenkman*, the personal representative of an estate brought a wrongful death action without retaining a lawyer. *Id* at 413. The trial court concluded the plaintiff was engaged "in the unauthorized practice of law" and dismissed the complaint. *Id.* On appeal, the personal representative cited the wrongful death act, providing that the action has to be "brought by and in the name of, the personal representative of the estate of the deceased person," MCL 600.2922(2), and claimed he had the constitutional right to appear *in pro per.* *Id* at 416. The Court of Appeals disagreed, emphasizing that the personal representative did not represent himself, but the decedent's estate:

> The estate, not the heirs, may bring an action and, as with other matters involving the estate, the duly appointed personal representative acts for, or represents, the estate. . . . That the estate's cause of action is 'brought by, and in the name of,' the personal representative does not mean . . . that the cause of action transfers over to, or becomes the right of, the personal representative.
>
> We note that this analysis comports with MCR 2.201. Although actions must generally be 'prosecuted in the name of the real party in interest,' MCR 2.201(B), a 'personal representative . . . may sue in his or her own name without joining the party whose benefit the action is brought,' MCR 2.201(B). These provisions more clearly state what the statute contemplates, albeit less clearly, that **a personal representative is a separate entity from the estate served and that the estate, not the personal representative, remains 'the real party in interest . . . for whose benefit the action is brought**.' MCR 2.201(B), MCR 2.201(B)(1). *Id* at 415-416 (emphasis added; citations omitted).

In *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007), this Court reiterated the singular legal identity of original and successor personal representatives. The decedent's brother was appointed original personal representative and filed an untimely medical malpractice action. *Id* at 415. After the first action was

dismissed, the decedent's mother was appointed successor personal representative and filed a second suit. *Id.*

Affirming the res judicata dismissal of the second suit, this Court, citing *Shenkman* and MCL 600.2922, rejected the argument that the two individuals serving as personal representative were different parties under the privity of interest factor:

> In this case, both plaintiff and the initial personal representative were representing the same legal entity – namely, the estate – and prosecuting the estate's cause of action against defendants for malpractice. The familial relationship between plaintiff and the initial personal representative is, therefore, irrelevant. Because plaintiff represents the same legal right that was represented by the initial personal representative, she is in privity with the initial personal representative. *Id* at 422.

As quoted above, the wrongful death act provides, in pertinent part, that "[e]very action under this section shall be brought by, and in the name of, **the** personal representative of the estate of the deceased." MCL 600.2922(2) (emphasis added). "The requirement of this section that a wrongful death action be brought by the personal representative of the deceased is mandatory." *Smith v Henry Ford Hosp*, 219 Mich App 555, 557-558; 557 NW2d 154 (1996).

The plain language of MCL 600.2922(2), coupled with the above-cited EPIC provisions and cases, conclusively establishes that "the personal representative" authorized to represent the estate and prosecute wrongful death actions is one person under MCL 600.2912b(1) – even if successor personal representatives are appointed. Whoever serves as personal representative acts in the capacity of representing one entity, the estate.

As Plaintiff's brief correctly explains, MCL 600.2922 is *in pari material* with MCL 600.2912b. *Waltz v Wyse*, 469 Mich 642, 666-667; 677 NW2d 813 (2004). Additionally, EPIC, as the more recently passed and more specific legislation, takes

precedence if there is any perceived conflict with MCL 600.2912b. *People v Beuhler*, 477 Mich 18, 26-27; 727 NW2d 127 (2007), citing *Imlay Twp Primary School Dist No 5 v State Bd of Ed*, 359 Mich 478; 102 NW2d 720 (1960).

Braverman II, *supra*, properly determined that individuals serving in the representative capacity as initial and successor personal representatives of an estate are the same "person" under MCL 600.2912b(1). While this conclusion resolves the issue, *Braverman II* also accurately held that EPIC's ratification and relation-back statutes empower a successor personal representative filing a medical malpractice complaint to rely on a NOI sent by a predecessor personal representative.

B. Several EPIC provisions unquestionably authorize a successor personal representative to rely on a NOI filed by his predecessor.

Braverman II correctly held that "MCL 600.2912b(1) has no bearing on a personal representative's powers under the Estates and Protected Individuals Code, MCL 700.1101, *et seq.*" *Id*, 275 Mich App 715-716. Several EPIC provisions – particularly MCL 700.3715, MCL 700.3716, MCL 700.3701, and MCL 700.3613 – unambiguously empower a successor personal representative to rely on a NOI filed by his predecessor.

EPIC grants a personal representative wide-ranging powers to act "for the benefit of interested persons." MCL 700.3715. These include the power to:

> Employ an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties, even if the attorney is associated with the personal representative, and act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment. MCL 700.3715(w).
>
> Prosecute or defend a claim or proceeding in any jurisdiction for the

> protection of the estate and of the personal representative in the performance of the personal representative's duties. MCL 700.7515(x).

In concert with MCL 700.1106(n), which defines a personal representative as a "successor personal representative," EPIC specifies that a successor personal representative shall enjoy "the same powers and duties as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible . . ." MCL 700.3716.

Two statutes definitively establish a seamless continuity between actions performed by the original personal representative and actions undertaken by a successor. The first, MCL 700.3701, states:

> A personal representative's duties and powers commence upon appointment. **A personal representative's powers relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment.** Subject to sections 3206 to 3208, before or after appointment, a person named as personal representative in a will may carry out the decedent's written instructions relating to the decedent's body, funeral, and burial arrangements. **A personal representative may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative.** (emphasis added).

This statute's second sentence relates the personal representative's powers back to actions beneficial to the estate occurring before appointment. Appellants' argument that sentence two applies only to actions performed by the same individual later appointed personal representative avoids the fourth sentence. This sentence expressly authorizes the personal representative to "ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative." Appellants erroneously claim that the fourth sentence does not contain a "relation back" feature. (Appellants' brief, p 40). Use of the past tense ("done")

establishes the Legislature's unambiguous intent to permit a personal representative to ratify and accept acts previously performed by another.

Sentence four illustrates the fatal flaw of Appellants' argument. If the original and successor personal representatives are the same person, as demonstrated above, then the NOI in this case satisfied MCL 600.2912b(1). No further analysis is necessary. If the original and successor personal representatives are different persons, then sentence four of MCL 700.3701 authorized Plaintiff, as successor personal representative, to rely on his predecessor's NOI in support of his complaint. The successor personal representative's statutory authority to ratify and accept previous acts undertaken by another that are beneficial to the estate supersedes any arguable requirement that he must re-send, under his name, an NOI served by his predecessor. As indicated above, as the more specific statute, MCL 700.3701 takes precedence over MCL 600.2912b. *People v Beuhler*, *supra*.

In his concurrence to the denial of leave in *Halton*, *supra*, Justice Markman noted his reservations whether a person not yet appointed personal representative "can file a notice of intent to sue." *Id*, 471 Mich 912; 688 NW2d 287 (2004). Citing MCL 700.3701, Justice Markman explained that his questions over the validity of the Court of Appeals' analysis in *Halton* was immaterial, since "plaintiff's appointment as personal representative relates back to her filing of the notice of intent." *Id*; see also *Chernoff v Sinai Hosp of Greater Detroit*, 471 Mich 910; 688 NW2d 284 (2004) (Markman, J, concurring).

In *Braverman v Garden City Hosp (Braverman I)*, 272 Mich App 72, 82 n 11; 724 NW2d 285 (2006), the court echoed Justice Markman's concerns "about the analysis in *Halton*, *supra*," noting that, by relying on MCL 700.3701, *Halton* could have reached the

same result "without creating the restrictive precedent under MCL 600.2912b(1)." The special panel in *Braverman II* similarly lamented *Halton's* failure to analyze the issue "under the provision of MCL 700.3701." *Id*, 275 Mich App at 714-715. Emphasizing that *Halton* did not address actions of an original and successor personal representative, but of the same individual before and after she was appointed, *Braverman II* properly indicated that, "[t]o the extent that *Halton* concludes that distinct human beings, acting successively as a personal representative for the same estate, cannot satisfy MCL 600.2912b(1), the conclusion should be viewed as dictum because those circumstances were not presented in *Halton*." *Id* at 715. The special panel then correctly held that EPIC authorizes a successor personal representative to rely on a NOI served by his predecessor. *Id* at 715-716. The court's holding was entirely consistent with MCL 700.3701.

It is also consistent with MCL 700.3613, which provides;

> The appointment of a personal representative to succeed a personal representative whose appointment is terminated is governed by parts 3 and 4 of this article. After appointment and qualification, a successor personal representative must be substituted in all actions and proceedings in which the former personal representative was a party. A notice, process, or claim that was given or served upon the terminated personal representative need not be given to or served upon the successor personal representative in order to preserve a position or right the person that gave the notice or filed the claim may have obtained or preserved with reference to the former personal representative. **Except as the court otherwise orders, the successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had if the appointment had not been terminated**. (emphasis added).

MCL 700.3613 redundantly establishes that appointment of a successor personal representative continues the predecessor's administration and actions as if the predecessor's "appointment had not been terminated." The final sentence confirms that a successor personal representative need not repeat actions performed by the

predecessor that were beneficial to the estate. Instead, the predecessor's actions, such as service of a NOI under MCL 600.2912b(1), are attributable to the successor.

Any other reading of MCL 700.3613 and the other statutes, cited above, would paralyze a successor personal representative from performing his duties under MCL 700.3715 and MCL 700.3716. It would require the successor to re-do every single thing the predecessor performed.

EPIC's provisions articulating the extensive and seamless powers of the personal representative unquestionably authorized Plaintiff to rely on his predecessor's NOI. *Braverman II* correctly held that a successor personal representative may file a complaint in reliance on a NOI sent by a predecessor personal representative.

C. Determination that an initial and successor personal representative are the same person for purposes of MCL 600.2912b(1) is not inconsistent with the conclusion that appointment of a successor personal representative triggers a new savings period under MCL 600.5852.

Claiming Plaintiff is trying to "have it both ways," Appellants argue that a determination that an initial and successor personal representative are the same person for purposes of MCL 600.2912b(1) is irreconcilable with a ruling that appointment of a successor personal representative triggers a new savings period under MCL 600.5852. (Appellants' brief, p 44). Appellants are mistaken.

The plain language of MCL 600.5852, specifically the unlimited phrase "after letters of authority are issued," initiates a new two-year savings when a successor personal representative is appointed. MCL 600.5852 neither affects the personal representative's powers nor alters the distinction between individuals acting for themselves and individuals acting in the distinct capacity of representing an estate. This statute merely grants a successor personal representative additional time to

exercise his powers under MCL 700.3715(x). Determination that a successor personal representative may rely on a NOI served by his predecessor under MCL 600.2912b(1) does not remotely preclude the holding effectuating the unambiguous language of MCL 600.5852.

III. DISMISSAL OF A SUBSEQUENT ACTION UNDER MCR 2.116(C)(6) AS ABATED BY A PREVIOUS ACTION CANNOT POSSIBLY BAR THE PREVIOUS ACTION UNDER THE RES JUDICATA DOCTRINE. RES JUDICATA POTENTIALLY BARS A SUBSEQUENT SUIT ONLY WHEN A PRIOR ACTION IS DISMISSED.

Summary of Argument

Appellants' spuriously argue that dismissal of Plaintiff's subsequent action under MCR 2.116(C)(6) bars this previously-filed case under res judicata.[6] Res judicata potentially applies only when previous cases are dismissed. Since a subsequent action was dismissed as abated by this prior case, res judicata is clearly inapplicable.

Standard of Review

The application of res judicata is a question of law reviewed *de novo*. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

Appellants erroneously argue that *Washington*, *supra*, established that dismissal of Plaintiff's subsequent claim bars the instant, previously-filed action under res judicata. *Washington* is clear that the res judicata doctrine "bars **a second, subsequent action** when (1) **the prior action was decided on the merits**, (2) both actions involve the same parties or their privies, and (3) **the matter in the second case was, or could have been, resolved in the first.**" *Id* at 418 (emphasis added). As the bold text

[6] Appellants concede that no res judicata argument was presented to the trial court or Court of Appeals. The MAJ relies on each of Plaintiff's issue preservation arguments. As a matter of jurisprudence, however, the MAJ is concerned about presentation and consideration of unpreserved issues in the Supreme Court.

shows, the res judicata rule potentially applies to bar a "second, subsequent action" when a "prior action" was dismissed. The rule cannot possibly bar a previously filed suit when a subsequent action is dismissed.

In 1886, this Court declared that "[t]here is no case that we know of sustaining any such doctrine as will give a subsequent suit the effect of abating a prior one." *Callanan v Port Huron & NW R Co*, 61 Mich 15, 21; 27 NW 718 (1886). Plaintiff correctly states that no decision, before or after *Callanan*, has ever held dismissal of a subsequently filed action as abated by a previous suit bars the previous suit under res judicata. Plaintiff is also correct that the few cases forced to address this issue resounding reject application of res judicata. (see Plaintiff's brief, pp 48-49).

The general rule, promulgated in MCR 2.116(C)(6), is that "the pendency of a prior action for the same cause and between the same parties within the same jurisdiction may be asserted as a ground for the abatement of the second action." Gnys v Amica Mut Ins Co, 121 RI 131, 136; 396 A2d 107 (1979). The plea of abatement of a previously filed, pending suit is sustained "when a final judgment in the prior suit would act as a bar to the second suit" under res judicata. *Id* (citations to national cases omitted).

Because a dismissal for abatement of action presumes that resolution of the prior, pending suit may bar the claim under res judicata, it is legally impossible for dismissal of a subsequently-filed action to preclude the original suit. The court *Orwick v Fox*, 65 Wash App 71, 83; 828 P2d 12 (1992), explained that "a claim in a *later* filed action cannot be raised as a bar to proceeding in an *earlier* filed action making essentially the same claim or based on the same facts." (original emphasis). *Orwick* cited, in part, *Gilman v Gilman,* 41 Wash2d 319, 323; 249 P2d 361 (1952), which held

that a "subsequent suit cannot be pleaded in abatement of prior action for same cause; it is the action first commenced and still pending when second suit is started that must stand." *Orwick, supra.*

Plaintiff filed the case at bar before instituting the claim that was dismissed under MCR 2.116(C)(6). The second suit was dismissed solely because this case was pending. Dismissal of the second suit cannot and must not bar this previously filed action under res judicata.

RELIEF REQUESTED

WHEREFORE, the Michigan Association for Justice respectfully requests this Honorable Court to affirm the lower courts' decisions, and hold that:

1. appointment of a successor personal representative triggers a new savings period under MCL 600.5852, notwithstanding the timing or reasons for the appointment or whether more than one suit has been filed;

2. a successor personal representative may file suit relying on a notice of intent filed by a predecessor personal representative under MCL 600.2912b(1); and that

3. dismissal of a subsequent action under MCR 2.116(C)(6) as abated by a previous action does not bar the previous action under the res judicata doctrine.

Respectfully submitted,

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